

IN THE United States DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CLAUDE BERNARD ROBINSON, et al.,

Plaintiffs,

v.

Case No.: **63-4916**

SHELBY COUNTY BOARD OF EDUCATION,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART THE JOINT MOTION
TO DISSOLVE ORDER OF THE COURT AND DECLARE
SHELBY COUNTY SCHOOL SYSTEM A UNITARY SYSTEM**

Before the Court is the joint motion by Defendant Shelby County Board of Education (“the Board”) and Plaintiffs to dissolve the order of the court in the above-styled case and declare the Shelby County School System a unitary school system. This litigation was originally filed in this Court in 1963 in an effort to remedy the unlawful segregation of the Shelby County School System. In various orders issued from 1964 to 1971, the Court directed the Shelby County School Board to dismantle all vestiges of its past state-imposed public school segregation with the ultimate goal of achieving a “unitary system” in which the County’s schools would no longer be “racially identifiable.”

Attorneys for the parties maintain that these judicially mandated goals have now been achieved, that the Shelby County School System should be declared a unitary system, and that the case should be dismissed. Hearings on the matter were held on January 26, 2007 and July 23,

2007. For the reasons stated herein, the Court grants in part and denies in part the motion. The Court also takes this opportunity to modify and clarify the terms of the existing injunctive decree in the interest of aiding the County in achieving full unitary status in the immediate future.

FROM BROWN TO THE PRESENT: THE DESEGREGATION CASES

In the Supreme Court's 1954 landmark Brown v. Board of Education decision, the Court abandoned the application of its Plessy v. Ferguson "separate but equal" doctrine in the field of public education, concluding that "[s]eparate educational facilities are inherently unequal." Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483, 495 (1954). Having declared racial discrimination in public education violative of the Constitution's guarantee of equal protection under the law, in its 1955 implementation decision ("Brown II") the Court directed the lower courts to "take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 301 (1955). While the "Brown II" opinion required "good faith compliance" with the "Brown I" holding "at the earliest practicable date," the Court acknowledged at some length the problems defendant school boards would face in such implementation and stated that "the courts may find that additional time is necessary to carry out the ruling in an effective manner." Id. at 300-01.

The Court's words turned out to be, at least in part, self-fulfilling prophecy, as school districts across the country found ample reason for postponing, often indefinitely, meaningful racial integration of their schools. The Court confronted such intransigence in Green v. County Sch. Bd. of New Kent Co., Va., 391 U.S. 433 (1968). At the time Green

was decided, very little progress had been made in integrating dual school systems which were historically the product of state-imposed segregation. The school district in Green, like many others, had responded to the threat of ineligibility for federal financial aid under the Civil Rights Act of 1964 by replacing their compulsorily segregated school system with a “freedom-of-choice” plan. Under this plan, it was left up to each student to decide whether to attend the previously all-white combined elementary and high school or the previously all-black school. After three years under the plan, not a single white child had chosen to attend the former black school and 85% of black children still attended the all-black school.

The Green Court provided much needed definition to the Brown mandate in its declaration that “[s]chool boards . . . operating state-compelled dual systems were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” Id. at 437. The Court stressed that delay was “no longer tolerable” and that “[t]he time for ‘deliberate speed’ has run out.” Id. at 438 (quoting Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218, 234 (1964)). According to the Court, “[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.” Id. at 439. “It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation.” Id. The Court indicated that among the most important indicia of a segregated system, and therefore of great importance in gauging efforts at desegregation, were a school system’s existing policy

and practice with regard to student assignment, faculty, staff, transportation, extracurricular activities, and facilities. Id. at 435.

The Court in Green also provided greater clarity as to the Court's proper role in the desegregation cases. "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." Id. "Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." Id. In a similar case decided by the Court at the same time as Green, the Court stated that courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved. Raney v. Bd. of Educ. of Gould Sch. Dist., 391 U.S. 444, 448 (1968) (internal quotations omitted).

While the Court did not categorically rule out the use of "freedom of choice," it noted that to date the approach had proved an ineffective tool of desegregation and "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of

choice’ must be held unacceptable.” Green, 391 U.S. at 441-42. It therefore required the school board to formulate a new plan, fashioning steps “which promise realistically to convert promptly to a system without a ‘white school’ and a ‘Negro’¹ school, but just schools.” Id. at 442.

Three years later, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Court attempted to define in more precise terms the duties of school authorities and the powers of federal courts to eliminate dual school systems and establish unitary ones, taking into account the seventeen years of “trial and error” by the lower courts in implementing the Court’s Brown decisions. The Court affirmed that the objective of the school desegregation cases was to eliminate from the public schools all vestiges of state-imposed segregation, which it had held violative of equal protection guarantees in Brown. Id. at 15. The Court also reaffirmed the broad equitable power of the courts to fashion a remedy to assure a unitary school system where school authorities have failed in their affirmative constitutional obligations set forth in Brown. Id. at 15-16. The Court offered “reasonable, feasible and workable” as possible defining terms for describing the scope of the equitable remedial powers of the district courts, but concluded that “words are poor instruments to convey the sense of basic fairness inherent in equity.” Id. at 31.

Based upon these bedrock principles, the Court affirmed the use of pairing and grouping of noncontiguous school zones and busing as permissible tools for court-mandated desegregation. Id. at 28-30. In the Court’s view, busing is a constitutionally acceptable remedy unless “the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process.” Id. at 30-31. It

¹ The Court uses the term “Negro” only where it reflects the usage in the historical document cited.

also noted that construction of new schools and the closing of old ones and the redrawing of attendance zone lines are essential tools of school authorities in meeting their constitutional obligations. Id. at 20, 27.

The Court discussed in depth the societal influence of school boards' decisions as to school location and student assignment.

Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Id. at 20-21. The Court further noted that segregative policy "may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." Id. at 21.

The Court also discussed at length the use of racial quotas in fashioning a desegregation remedy. The Court stated that the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." Id. at 24. But so long as mathematical ratios are not used as inflexible requirements, the Court concluded, they may be used as part of an equitable remedy under appropriate circumstances, since "[a]wareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations." Id. at 25. The Court cogently noted that

in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the

school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory.

Id. at 26 (emphasis added).

To those who protested that school children should be allowed to attend neighborhood schools, the Court stated firmly,

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their home. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems . . . 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.

Id. at 28. See also Davis v. Bd. of Sch. Comm'rs of Mobile County, 402 U.S. 33, 37 (1971) (“‘[N]eighborhood school zoning’ . . . is not the only constitutionally permissible remedy; nor is it *per se* adequate to meet the remedial responsibilities of local boards.”).

With regard to faculty desegregation, the Court rejected the defendant's contention that the Constitution requires that teachers be assigned on a “color blind” basis and prohibits a court from using its equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. Id. at 19. The Court upheld the district court's setting as a faculty assignment goal a ratio of white to black faculty members substantially the same throughout the system. Id.

In the years following Swann/Davis, the Court imposed some limits on the courts' discretion in fashioning desegregation remedies. Notably, in Milliken v. Bradley, the

Court ruled impermissible a multi-district remedy without a showing of “a constitutional violation within one district that produces a significant segregative effect in another district.” 418 U.S. 717, 744-45 (1974). In a related decision in the same case, the Court stated that “federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.” Milliken v. Bradley, 433 U.S. 267, 282 (1977).

The Court built upon the conceptual framework laid in Milliken in its Bd. of Educ. of Oklahoma City v. Dowell decision, in which it held that federal supervision of local school systems was intended as a temporary measure to remedy past discrimination and that a desegregation decree should be dissolved after local authorities have operated in compliance with it for a reasonable period of time. 498 U.S. 237, 247-48 (1991). This holding, the Court declared, “recognizes that ‘necessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.’” Id. (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

The Court revisited the issue of court-imposed mathematical ratios in Pasadena City Bd. of Educ. v. Spangler, in which it distinguished between, on the one hand, using ratios as a “starting point in the process of shaping a remedy,” acceptable under Swann, and using them as an “inflexible requirement” to be applied anew each year. 427 U.S. 424, 434 (1976). The Court held that by enforcing its order so as to require annual

readjustment of attendance zones so that there would not be a majority of any minority in any school, the district court in that case exceeded its authority. Id. at 435.

According to the Court, the district court had approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools and the initial implementation of the plan had undisputedly accomplished that objective. Id. at 436. The Court found that, having once implemented the plan, the district court "had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." Id. at 437. The continuing monitoring of the school board's performance against a numeric goal was beyond the scope of the court's authority, especially in light of evidence that the "slippage" in the racial makeup of the district's schools resulted from normal demographic changes in the area's residential patterns.

In 1992, the Court once again grappled with attempts at mathematically quantifying compliance with a desegregation decree. Freeman v. Pitts, 503 U.S. 467 (1992). The Court, in a unanimous opinion, held that once a portion of a desegregation order is met, the federal court should cease its efforts as to that part and remain involved only in those aspects of the plan that had not been achieved. As to the question of racial balance, the Court held that

racial imbalance in student attendance zones [is] not tantamount to a showing that the school district [is] in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. . . . If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. *The school district*

bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation.

Id. at 494 (emphasis added).

As in Spangler, the desegregation plan at issue in Freeman had “accomplished its objective [of racial balance in student assignment] in the first year of operation, before dramatic demographic changes altered residential patterns.” Id. at 493. The Court concluded that “[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.” Id. at 495.

In succinct summary of how a district court should approach a determination on ending its oversight of a desegregation case, the Court offered the following perspective: “The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.” Id. at 492 (quoting Dowell, 498 U.S. at 249-250).

In the Supreme Court’s most recent foray into issues of racial diversity in the public schools, the Court determined that use of raced-based student assignment in the public schools must be “narrowly tailored” to achieve a “compelling” government interest. Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007). The Court concluded that the two school board diversity plans before it did not meet this test and were therefore unconstitutional. The Court reiterated its position that remedying effects of past intentional discrimination is a compelling interest under the “strict scrutiny” test, but determined that such an interest was not involved where the

district court had lifted the relevant desegregation decree (as in the Louisville case) or where the district was never subject to court-ordered desegregation (as in Seattle). The Court made clear that what was constitutionally allowed, and even required, under a desegregation decree, may be prohibited where a school district is not under such a decree. Id. at 2755 n.12.

These most recent cases do not impact the present case directly, since Shelby County is under an existing desegregation decree. However, the Supreme Court's holdings do underscore the momentous, irreversible nature of this Court's pending decision as to whether the County has achieved unitary status.

PROCEDURAL HISTORY²

On **June 12, 1963**, twenty-one public school students filed a class action against the Shelby County Board of Education seeking a judgment declaring the County's operation of its school system to be unconstitutional. Plaintiffs also sought a permanent injunction preventing the County from maintaining a segregated public school system and a court order directing the County to present a complete plan for the desegregation of its school system.

The Board denied that its school system was unconstitutional but produced a written desegregation plan as demonstration of its sincerity of purpose in integrating the Shelby County Schools. The plan allowed any Shelby County public school student, subject to certain academic, financial, and social adjustment qualifications, to transfer from their formerly segregated school to any other school in the same general school area

² This history, while of considerable length, is but a summary of a more comprehensive history prepared by court staff. This complete history is provided as an attachment to this order.

by applying to and obtaining the recommendation of his or her school principal. The plan deferred until later any attempt to integrate the faculty.

On **March 17, 1964**, the Court³ adopted the Board's plan to integrate the schools over Plaintiffs' strenuous objections and rejected Plaintiffs' alternative plan because it compelled racial balance in the schools and, in the Court's view, was impractical and unworkable due to the inherent "serious and insurmountable problems, including the transportation of students."

Following the passage of the Civil Rights Act of 1964, which authorized the U.S. Attorney General to bring lawsuits against school districts that were resisting the law, the United States entered the case as plaintiff-intervenor in **1966**. The U.S. forcefully argued that the Board's plan was contrary to recent case law and HEW procedural guidelines. The government observed that after two years under the plan the school system remained almost completely segregated.

Soon thereafter, the Court entered a consent decree amending the Board's desegregation plan and requiring the County to take reasonable steps to eliminate existing racial segregation of faculty by, among other measures, filling all faculty vacancies through reassignment of presently employed faculty members to such vacancies in a manner that would correct the effects of past segregation. The order also mandated implementation of an exercise of choice plan requiring all students to submit a choice of school form each year. Failure to submit the form would result in assignment to the school nearest to the student's home where space was available. Students and parents were to exercise their choice free of any influence by any official, teacher, or employee

³ In this section of the order, "the Court" refers, unless otherwise specified, to the Western District Court of Tennessee.

of the school system. The amended plan also, for the first time, required that no student be segregated or discriminated against in any school-sponsored service, facility activity or program, including transportation, athletics, or other extra-curricular activity.

After a single semester under the new plan, in **January 1967**, the United States complained that the Board had failed to comply with the consent order. Specifically, the government asserted that since the order was entered virtually all vacancies and new teaching positions had been filled by teachers new to the system and that all positions had been filled on a racial basis, with white teachers being assigned to white schools and black teachers being assigned to black schools.

The government also asserted that the Board had violated the administrative requirements of the student desegregation plan by failing to notify black students as to whether their applications to attend their school of choice had been accepted. In addition, the U.S. asserted that Defendant had failed to offer black students whose applications to attend previously all-white schools had been denied on grounds of over-crowding the right to elect another school of their choice, including a previously all-white school, but had in some instances required them to enroll in “the school nearest to them,” in most instances an all-black school. In some parts of the county, Defendant had also allegedly failed to take reasonable steps to inform black students electing to attend desegregated schools of the availability of transportation and the times and places where it could be secured. The United States claimed that, as a result of these violations of the Court order, the County school system continued to be almost totally racially segregated: approximately 198 black students (1.3%) attended predominantly white schools, and no white students attended black schools.

The Board admitted the facts alleged in the government's motion and, on **January 19, 1967**, the Court determined that Defendant had not complied with the permanent injunction and ordered the Board to take the following remedial measures:

- Reassignment, with notice and option to decline, to the school of choice of black students who were denied enrollment in their school of choice.
- Adoption and implementation of a plan for giving each student full notice of the availability of transportation, the location of school bus routes, and bus stops and schedules, prior to the commencement of each school year.
- Assignment and reassignment of teachers in a manner whereby the abilities, experience, specialties, and other qualifications of both white and black teachers in the system will as much as possible be distributed evenly among the various schools of the system. (Faculty to be deemed desegregated when the ratio of white teachers to black teachers is the same, give or take 10 percentage points, as the ratio of white to black teachers in the system as a whole.)
- Each faculty vacancy to be filled by transferring from within the system a teacher whose race is under-represented (according to the above ratio) in the faculty in which the vacancy exists. A teacher of the race that is over-represented in the school shall be employed by or assigned to vacancy **only if a teacher of the opposite race can neither be transferred nor employed without seriously impairing the education program.**
- Development and implementation of a program to recruit white teachers for employment in schools traditionally staffed by black teachers and black

teachers for employment in schools traditionally staffed by white teachers. No teacher shall be employed who is unwilling to teach students of another race and to serve on a faculty which includes teachers of another race.

- **Transfer for the coming year of faculty to schools in which their race is under-represented in all cases in which the transfer can be accomplished without seriously impairing the educational program.**
- Reporting requirements:
 - **Prior to filling any faculty vacancy with a teacher of a race that is over-represented in the faculty of the school in which the vacancy exists, report required detailing efforts to transfer or employ teacher of opposite race.**
 - Report on **August 1 of each year** detailing faculty composition by race of each school, assignments by race for the coming year, number of vacancies filled, number of such vacancies filled by teacher of overrepresented race.
 - Report on **October 1 of each year** supplementing and updating August 1 report.

In **June 1967**, the Board petitioned the Court to modify its requirement that the County achieve and maintain a specific ratio of faculty on grounds that the prevailing law relating to teacher desegregation “does not go to the extent of requiring a particular race ratio before a system can be found in compliance.” The Court dismissed the motion as without merit.

In **August and October 1967**, the Board submitted the first of its regular faculty reports. The County reported that 54 white teachers (6 of whom subsequently resigned) and 74 black teachers had been transferred to schools in which the predominant race was not their own. This is in contrast to the Court's requirement that such transfers for the 1967-68 school year be made **in all cases in which the transfer can be accomplished without seriously impairing the educational program**. With a faculty population, almost entirely segregated, of around 1500, the County saw it appropriate to transfer only 128 teachers for the new school year. The result was that the County made only very modest gains in faculty desegregation.

The October 1967 report notes that the total student population of the County school district for the 1966-67 school year was 36,487 (14,240 (39%) black, 26,247 (61%) white). In 1967-68, the total was 42,077 (13,605 (32%) black, 28,742 (68%) white).

Following the Supreme Court's 1968 decision in Green v. New Kent County, which placed on school boards the burden "to come forward with a plan that promises realistically to work, and promises realistically to work now," Plaintiffs filed a motion for further relief, requesting an order requiring that Defendant submit a new desegregation plan in light of Green. Quoting Green, Plaintiffs declared that freedom of choice plans are constitutionally unacceptable where "there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary nonracial school system."

The United States filed a parallel motion for further relief, echoing Plaintiffs' request for a desegregation plan for assignment of pupils to schools based on unitary,

non-racial, geographic attendance areas and/or on the consolidation or pairing of schools, to be fully effective at the commencement of the 1968-69 school year. The motion also asked for the total desegregation of all faculties pursuant to the order of this Court of January 19, 1967, to be fully effective at the commencement of the 1968-69 school year.

On **July 17, 1968**, the Court issued a memorandum decision and order in response to the motions for further relief wherein the Court recognized that, as a result of Green and other recent Supreme Court decisions, “integration of pupils and faculty is the legally required end result, if feasible, of all desegregation plans,” as opposed to mere racial neutrality with respect to the assignment of pupils to schools. “[T]hese decisions require . . . that segregated schools be affirmatively disestablished and that no school should be recognizable as a ‘white’ or ‘Negro’ school, if feasible. These recent decisions also make it clear that such action must be taken forthwith, though not necessarily almost instantaneously.”

In recognition of the late date, the Court ruled that beginning with the 1968-69 school year, as to grades one through six, the proportion of white to black teachers in each school was to vary not more than 10 percentage points from the proportion of white to black teachers who are teaching in such grades in the entire system. By the beginning of the 1969-70 school year, the proportion of white to black teachers in each school was to not vary more than 10 points from the proportion of white to black teachers in the entire system.

Defendant was also required to prepare a plan for integration of pupils, to be effective beginning with the school year 1969-70, under which, to the extent feasible, no school in the system would be identifiable as a “white” or “Negro” school. The Court

ordered that Defendant, in its plan for the assignment of pupils, so far as feasible, maintain in each school operated by the Shelby County system a ratio of black to white students within 10 percentage points in each school of the ratio of black to white students in the system as a whole. Defendant was also required to seek the aid of the Title IV Education Center of the University of Tennessee in preparation of such plan.

The Board's **October 1968** faculty report purported to detail the County's compliance with the Court's order relating to the proportion of white to black teachers required in each school at the beginning of the 1968-69 school year. The report did not establish a baseline faculty composition against which each school's faculty was to be compared. By the Court's own calculation, the systemwide composition was 34% black, 66% white. Grades one through six were to achieve this percentage, give or take 10 percentage points, by the beginning of the 1968 school year. This would yield an acceptable range of 24-44% black. Applying this range to the figures supplied by the County, the County appears to have been in compliance in 31 out of 41 schools identifiable as elementary schools.

The County submitted to the Court a revised desegregation plan pursuant to the Court's order. According to the plan's preamble, while the amended plan "will result in a reduction of all Negro schools from 23 to 7, and will increase the number of integrated Negro students from less than 1,000 to more than 9,000 of the 14,000 Negro student population, it was determined that the elimination of the remaining 7 all-Negro schools for the 1969-70 school year could not feasibly be accomplished. Growth and development patterns, and shifting race distribution clearly indicate, however, that the 7 remaining all-Negro schools can and will be phased out over a period of the next five

years.” The Board stated that it was “now in substantial compliance with the orders of the Court regarding the desegregation of faculties in grades one through six.” The Board cited numerous problems relative to attaining any particular race ratio among its faculty in the individual high schools, however, and requested that the Court relieve it of the obligation of meeting any particular race ratio among high school faculty at these schools, so long as substantial high school faculty desegregation takes place and no high school faculty assignments are made on the basis of race.

The Educational Opportunities Planning Center of the University of Tennessee filed with the Court an “Interpretation and Critique” of Defendant’s proposed desegregation plan. The Center observed that under the Board’s revised plan the number of black students in desegregated schools would increase significantly, as well as the ratio of black students to white students in some schools which would be integrated. However, large numbers (61% of all black students, and 73% of black high school students) would remain in segregated schools. One-third of all elementary schools in the system would be completely segregated. A majority of the black students in the system as a whole would be assigned on a racial basis under the plan.

The Center observed that under the plan some white children lived closer to a segregated black school than to the predominantly white school to which they would be assigned and, similarly, some black children lived closer to a segregated white school than to the predominantly black schools to which they would assigned. The proposed plan therefore required more transportation of students than would a plan based on non-racial, unitary geographic zones for all students

Despite the desegregation accomplished, the Center concluded that a dual school system would still persist. The Center also observed that there would be six high schools with total enrollment of 400 or less. According to the Center, most education authorities maintained that these schools would have enrollments too small to permit well-rounded educational programs. Thus, optimal use of plants would not be achieved under the proposed plan.

Plaintiffs filed objections to the County's proposed plan, asserting that the plan recreated dual over-lapping school zones based on race and failed to eliminate, where feasible, the all-black schools previously established under the segregated system. Plaintiffs further asserted that the plan was based on the unconstitutional requirement that no school shall have a minority of white students, and that it failed to provide for desegregation of high school grades and created artificial barriers to desegregation of faculty and staff. Finally, Plaintiffs noted that the plan provided for the continued operation of every major black school as an all-black school for the upcoming year: the only all-black schools eliminated were the three small schools which were closed under the plan and the all-black schools eliminated from the system as the result of annexation.

The United States filed its own objections to the plan, asserting that Defendant's plan failed to comply with the Court's orders. The government observed that at the elementary and high school levels the plan utilized two methods of assigning pupils to schools: unitary, geographic zoning were used primarily in predominantly white suburban areas, and, in areas of the county where black residents predominate, dual attendance zones were used in which a child's school assignment was determined by his race. The unitary zones would result in five all-white elementary schools, one all-black

elementary school, seventeen predominantly white elementary schools, and four predominantly white high schools. The dual zones would result in seven all-black elementary schools, nine majority white elementary schools, five all-black high schools, and five predominantly white high schools.

Under the plan, according to the government, approximately 60% of the school system's black students would be assigned to particular all-black schools solely on grounds of race. For those students, the plan reinstated a method of pupil assignment epitomizing the unconstitutional dual system defendants are obligated to dismantle: dual, overlapping, gerrymandered attendance zones assigned all the white students living in large areas of the county to majority white schools and all black students living in those same areas to totally black schools. The government attributed this perpetuation of the complete racial identification of their student bodies to a conscious effort on the part of the Board of Education: "Defendants must bear the burden of demonstrating why they have rejected feasible alternatives which would promise more effective and prompt relief, i.e., unitary zoning for all schools accomplishing the immediate desegregation of each school, or due to the location, size, and nature of existing facilities, pairing as a more effective alternative." The government further stated that "because certain teacher shortages are the result of past inadequacies of course offerings in negro schools, Defendants have an especially heavy burden to achieve full faculty desegregation."

In **May 1969**, the Court issued an opinion and order regarding the proposed plan, in which it noted that for the 1969-70 school year there will be 34,912 students in the county system, of which approximately 72% will be white and 28% black. Under the proposed plan the percentage of black pupils attending desegregated schools would

increase from 5% during 1968-69 to around 50% during 1969-70. It further appeared to the Court that the ratio of white to black teachers in each elementary school during the coming year would be the same, within a tolerance of 10%, as the ratio in the system as a whole, which was two-to-one. The Court noted that such teacher desegregation, under the proposed plan, would not occur in the high schools; it appeared that the ratio for white to black teachers in the predominantly white schools would be about five to one and in the all black schools will be about one to five. However, the Court determined that there was a dearth of certified black high school teachers in such subjects as Latin, French, physics and biology and a lower percentage of black pupils than of white pupils elect such subjects. Consequently, there was a special problem in desegregation of high school faculties, and the problem could not be ameliorated until more desegregation of pupils in the high schools was accomplished. Finally, the Court concluded that although the Board's plan would not, as a long-term proposition, meet the requirement of Green, given the late date of objections and in view of the considerable progress made in desegregating the schools it was proper to approve operation under the plan during the coming year.

Later that same year, the Court entered an addendum to its opinion and order. The Court declared that the County's position that the continuance of all-black schools was necessary due to the prevalent racial segregation in the County represents a misunderstanding of the import of its prior order. Simply because the prescribed proportion could not feasibly be obtained was not a valid excuse for not effecting the desegregation that *was* feasible. The Court stated that "in the situation with which we are now concerned unitary zones are required and the fact that white pupils will either move or attend private schools is irrelevant." The Court held that the law requires that these

white pupils be presented with the options of attending these schools, or moving, or attending private schools.

The Court further held that, while problems unique to high schools exist, the Board must recognize that, to the extent feasible, such secondary school faculties must be desegregated so that the ratio of white to black teachers in each such school will be within 10% of their ratio in the system as a whole. The Court ordered that, on or before January 15, 1970, the Board was to file a plan for desegregation, to be effective with the 1970-71 school year, that met the requirements of the Court's order.

On **April 6, 1970**, the Court issued an opinion on the motions of plaintiffs and the United States for further relief. The court departed from its prior determination that, under Green, the racial makeup of each school should be as reflective of the entire school system as feasibly possible. The Court quoted a concurring opinion by the Chief Justice of the Supreme Court in Northcross v. Bd. of Educ. of Memphis, Tenn., (“a unitary system [is] one ‘within which no person is to be effectively excluded from any school because of race or color.’”) and the Sixth Circuit Court of Appeals in the same case (“The United States Supreme court has not announced that [a percentage quota] is the only way to accomplish a ‘unitary system.’”).

Stating that “[w]e have expressed our own view that such a formula for racial composition of all of today’s public schools is not required to meet the requirement of a unitary system,” the Court concluded that “neither our Court of Appeals nor the Chief Justice believes that the Supreme Court has decided that the Constitution requires that a ‘particular racial balance must be achieved in the schools . . .’ Accordingly, our best judgment is that, as of now, a school system that has honestly drawn unitary geographical

zone lines, that is, zones not gerrymandered to preserve segregation, and that severely limits transfers, is not a 'dual system' with respect to pupils." The Court further stated that "any proposal of the defendant Board that is constitutional must be approved. In short, it is not for this court to determine the wisdom or lack of wisdom of a particular proposal of the defendant Board; it is for us to determine only whether or not it is constitutional." The Court rejected, by disregarding it, the implicit contention of the Attorney General and Plaintiffs that the Constitution requires that all feasible steps be taken to balance the races in each school.

The Court held that its prior order to integrate elementary school teachers would remain in effect. With respect to secondary school teachers, the Court required only that such teachers be employed and discharged without consideration of race and that to the extent feasible, in the light of the qualifications of the teachers and the need for teachers of particular qualifications in the school, such teachers should be assigned and transferred so that the ratio of white to black teachers in each school will be, within a tolerance of 10%, the same as in the system as a whole.

The Court also directed that "[t]he school board will file notice of all future building plans with the Clerk and furnish counsel for the original plaintiffs and the Attorney General with copies of such notices." The Court declared that counsel for Plaintiffs and the Attorney General would have 30 days from the mailing of any such notice to state their objections.

On appeal, the Sixth Circuit Court of Appeals remanded the April 6, 1970 opinion for reconsideration in the light of its opinion and the recent opinions of the Supreme Court. To the district court's statement that "a school system that has honestly drawn

unitary geographical zone lines, that is, zones not gerrymandered to preserve segregation, and that severely limits transfers, is not a 'dual system' with respect to pupils," the appeals court stated that "[a]lthough this may be a correct statement of the duty imposed upon a school district which has not practiced racial segregation, it does not apply here where there has been a long history of segregated education. In this case, the Supreme Court has recognized the affirmative duty of the lower courts to require the eradication of the effects of past unlawful discrimination." Robinson v. Shelby County Bd. of Educ., 442 F.2d 255, 257 (6th Cir. 1971).

The Court of Appeals quoted Green: "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." "It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which be shown as feasible and more promising in their effectiveness." Id.

The Court of Appeals also quoted the lower court: "All that is required of defendant in the area of zoning is that it take affirmative action to maximize integration in all feasible ways so as to promote the immediate establishment of a unitary school system." Id. at 258. The Court held that the absence of a finding that the approved zones were racially gerrymandered or that the Board acted in bad faith does not excuse the District Court from ordering revision of the attendance zones to insure the Board's compliance with its affirmative duty. Id. "Where there has been a history of state-imposed segregation of the schools, it is not sufficient to adopt a plan which, out of

context, might be seen as nondiscriminatory but which does not do as much to disestablish segregation as an alternative proposal which is feasible and pedagogically sound.” Id.

On remand, this Court held on **May 28, 1971** that, in light of the Court of Appeals decision and the Supreme Court’s decisions in Swann v. Charlotte-Mecklenburg Board of Education and Davis v. Board of School Commissioners of Mobile, unanimously holding that “pairing and grouping of non-contiguous school zones is a permissible tool” and local school authorities may be “required to employ bus transportation” in order to achieve the “greatest possible degree of actual desegregation, taking into account the practicalities of the situation,” the Court was required to order the effectuation of a unitary school system in Shelby County.

The Court ordered Defendant to file within two weeks a plan for the complete dismantling of any remaining vestiges of segregation in the Shelby County school system, extending to all facets of school operation. The Court demanded that the plan meet the following standard: while fixed ratios of pupils in particular schools were not required, efforts should be made, in designing the plan, **to reach toward the establishment of the systemwide pupil racial ratio in the various schools so that there would be no basis for contending that one school was racially different from the others.** These results were to be brought about “by the use, as necessary, of all available practicable techniques, including but not limited to restructuring attendance zones, pairing of attendance zones, restructuring of grade levels as between various schools, and use of transportation.”

In **June 1971**, the Board presented its revised desegregation plan with which it purported to comply with Swann and the Circuit Court's opinion. The Board stated that **“[w]ith the implementation of this proposed plan, the defendants know of no reason why the Shelby County School System should not be classified as a unitary system and this case dismissed.”**⁴

The United States filed objections to Defendant's proposed plan and to that plan as modified by the Educational Opportunities Planning Center. According to the government, both plans failed to remove the racial identity of several schools in that system for the coming school year, causing a significant portion of the system's students to attend schools which continued to be designed to serve primarily black or white students. The government asserted that educationally sound and administratively feasible alternative methods of desegregation, such as redrawing zone lines to maximize desegregation, pairing or clustering of schools and non-contiguous zoning, were available which, if employed, would promise to immediately disestablish the dual school system.

On **August 11, 1971**, the Court issued a memorandum decision regarding the proposed plan and the various amendments and objections. The Court first reflected on the impact of the Swann decision. Under Swann, according to the Court, the proper aim is to do away with state-imposed school segregation. Where a school board's plan proposes the continuation of schools that are all or predominantly of one race, there is a presumption that the racial composition of such schools is a vestige of *de jure* segregation, placing the burden on the school board to show that such assignment of pupils is genuinely nondiscriminatory.

⁴ While the County stated that its school system should be classified as unitary, until the 2006 motion presently before the Court it never formally moved the Court for such recognition.

The Court noted that state-imposed school segregation and its vestiges have been done away with when the school system has become “unitary” and a system can be said to be unitary when the schools are no longer “racially identifiable.” In the Court’s view, while the ratio of white to black pupils in a school, as compared with the ratio in the system as a whole⁵, is a highly important factor in determining whether a school is racially identifiable, it is not constitutionally required that each school in the system have approximately the same ratio of whites to blacks as does the system as a whole and some all-black (or white) or nearly all-black (or white) schools may exist in a desegregated system.

The Court indicated that, in addition to the racial composition of the student bodies, other important indicia of a unitary system are the racial composition of faculty and staff in each school and the facts with respect to desegregation of extra-curricular activities and transportation. Equitable principles are to be applied in fashioning the remedies to bring about a unitary system, including imposition of approximate pupil and faculty racial ratios; use of gerrymandered zones and non-contiguous zones; pairing and clustering of schools; and busing of pupils.

In selecting the remedies to be used, the Court stated that the necessity for and the feasibility of the remedy should be primary considerations. So long as a school remains racially identifiable, it is absolutely required that optional majority to minority pupil transfers be allowed with necessary transportation paid for by the school board. Once a school system has reached a state of “constitutional grace,” i.e., has been desegregated, later segregation not caused by policies of state agencies need not be treated.

⁵ The Court noted that at that time the system wide ratio was 7 to 3.

The Court noted that during an earlier hearing, a DOJ expert gave the opinion that the history of the school is an important factor in determining racial identifiability. Thus even if a school has a predominantly black student population it may be identifiable as a “white” school because it has historically been a white school. Similarly, a school that has historically been black and has been desegregated with only a minority of whites can nevertheless be accepted as not racially identifiable if the whites do not flee and remain in the school and therefore the school is stable. Thus racial identifiability depends at least in part on how the community thinks of the school.

Any argument against the feasibility of busing was greatly undercut, in the Court’s view, by the fact that the Shelby County system has bused pupils for a long time and has bused as many as 20,000 pupils. In the days of segregation it bused blacks past white schools and whites past black schools. The cost and burden of busing should be weighed against the real necessity of such busing in bringing about a unitary system.

The Court observed that the DOJ’s plan would come closer than the Board’s plan, as amended by suggestions of the Title IV Center, to creating a racial ratio in each school that approximates the ratio in the system as a whole. However, it would also require substantially more busing, though it was not clear how much more. The Court deemed it clear that the additional buses could not be obtained for the coming year because they were generally unavailable and that to carry out the DOJ’s plan at that time it would necessitate staggering the daily starting time of the schools. The Court therefore adopted the Board’s plan as amended by the Title IV Center, incorporating some of the features of the DOJ’s plan and the proposals of various intervenors.

Notably, the Court rejected one DOJ proposal to extend the zone of Barrett-Bolton High School to include some whites in a neighboring community, thus reducing the percentage of blacks from 2/3 under the Board's plan. The Court rejected the DOJ modification because the high school didn't need to be "treated." "The contemplated racial composition of these schools would be the same if there had never been de jure segregation applicable to the area they serve. Thus the racial composition of these schools cannot be said to be a vestige of state-imposed segregation."

The Court further found that because Capleville, Woodstock and Arlington elementary schools were "probably stable" they did not need to be treated, even though they had majority black populations (75%, 67%, 60% respectively). Similarly, the Court rejected the DOJ plan for treating Barret's Chapel Elementary: it did not require treatment because its population was reflective of that of the surrounding area.

The Court approved the Board's zoning of elementary schools with virtually all white student populations, most notably Egypt Elementary (95% white). The Court rejected the Plaintiffs' contention that these schools cannot be left heavily white and must be treated. With apparent disdain, the Court observed that "[t]heir theory appears to be that blacks must be sent to these schools, not because of any advantage to the blacks in going to school with whites and not even to enforce the right of the black pupils to go to a school that is not racially identifiable, but only to enforce the claimed right of black pupils to go to a school in a system in which none of the schools is racially identifiable."

In **July 1977**, the United States objected to Defendant's proposed construction of a vocational education facility on the Bolton High School site. The U.S. requested that Defendant close the Bolton facility as soon as students currently attending there could be

accommodated in the other high school facilities in the system. As reasons, the U.S. asserted that, although blacks comprised only 22% of Shelby County's student population, 75% of the students at Bolton High were black. The government further asserted that Bolton High was substantially inferior to the other high school facilities in the system and that while all the other county high schools had been completely rebuilt or substantially renovated since 1971, Bolton, built in the 1920s, had remained the same. Furthermore, its student population of 367 made it impossible for Bolton to offer as extensive an academic program as the other high schools in the county, which were larger in size.

Plaintiffs concurred, calling Bolton "the last remaining bastion of educational inequality at the high school level in the Shelby County School System." A few weeks later, Plaintiffs equivocated, stating that feedback from the community surrounding Bolton High had raised the question of whether the continuation of Bolton High might be in the community's best interest in promoting "racial harmony" and providing a "better educational situation." Plaintiffs recommended that the Court conduct a hearing on the matter.

Defendant filed a statement of disagreement with the DOJ's assertion that Bolton was an inferior facility. In addition to the proposed new vocational education facility, the Board anticipated spending an additional one-half million dollars during the 1978-79 fiscal year to further upgrade the physical plant.

The Court entered a consent decree approving construction of a vocational building at Bolton High School. Consent was conditioned upon defendant's commitment to substantial construction of new facilities and improvement of old facilities at Bolton

High designed to make Bolton comparable in size and quality to other high school facilities. Defendant agreed not to seek construction of an additional high school in this area until these improvements to Bolton were completed. When Bartlett and Millington High reached full capacity, additional students were to be assigned to Bolton. As enlargement of Bolton High occurred, every reasonable effort was to be made to make the racial composition of the student body reflective of the racial composition of the school system as a whole.

In **April 1985**, the United States filed objections to the plan to construct ten additional classrooms at Lucy Elementary. The United States claimed that the proposal not only adversely affected the status of desegregation in the district but also ignored available options that would further desegregation in this district. The government asserted that the decision to construct additional classrooms at Lucy, as a means of relieving overcrowding, avoided the utilization of unused classroom space at contiguous elementary schools with significant minority enrollment. The government stated that “[a]lthough the defendant has reassigned students to contiguous schools to relieve overcrowding in situations where both the sending and receiving schools were overwhelmingly white, the defendant had refused to use reassignment as an alternative at Lucy.” The United States concluded that, in essence, the Board’s plan to remedy overcrowding at Lucy favored an approach that ensured racial isolation over feasible alternatives that promoted desegregation: “Defendant’s acquiescence to the Lucy community’s desires, the community having expressed opposition to the possibility of reassignment, cannot justify the defendant’s failure to consider the negative impact of its proposal for construction of additional classrooms on desegregation at Lucy.”

The Court denied Defendant's petition to construct 10 permanent additional classrooms at Lucy Elementary School, stating that the Shelby County Board of Education had apparently failed in its constitutional duty since it had given no consideration to how the improvement plan would impact the existing desegregation plan. The Court determined that construction of 10 additional permanent classrooms at Lucy Elementary School would perpetuate Lucy as a predominantly white school contiguous to a number of underutilized schools, each having significantly greater black student enrollment. The Court concluded that the Board had apparently accorded its concept of "community pride" a higher standing than its constitutional duty to eliminate all vestiges of segregation within the Shelby County school system.

In **November 1987**, the Board petitioned for approval of a modification of the desegregation plan to allow the acquisition of land and construction of a new high school in East Shelby County, between Germantown and Collierville, in order to alleviate the overcrowded conditions in the involved areas. The County projected that the proposal would have no adverse effect on desegregation efforts and that the new school would have a racial composition nearly identical to that of the County system as a whole.

Plaintiffs filed objections to the proposed high school construction. They asserted that projected enrollment for the new high school was 8% black, yet the county-wide student population was **14% black**. As a result, Plaintiffs maintained that the construction would "further create racial isolation unless a different and more racially integrative student assignment plan can be worked out."

In a supplementary memorandum supporting the proposed construction, the Board stated, "The Shelby County School System has made every effort to operate a unitary

school system. All students are assigned to the school serving the zone in which they reside, and zone lines are drawn to maximize desegregation within reasonable distances. It would, therefore, seem that a racial composition of 92.7% White and 7.3% Black would exhibit good faith on the part of the school system.”

The United States filed a response to the construction proposal, in which it stated that it did not oppose the construction of the new high school. However, the United States expressed opposition to the proposed modifications to the Bartlett High School attendance area because the Court’s 1977 consent order required “that overcrowding at Bartlett or Millington High Schools be relieved through reassignment of students to Bolton High, accompanied by whatever new construction that might be needed at Bolton in order to make Bolton comparable in size and quality to other high school facilities in the system. Because the task of making Bolton comparable has not yet been completed, any adjustment in Bartlett’s attendance area not involving reassignment to Bolton should not be considered.”

The Board subsequently amended its proposal to delete from the new high school zone the area currently within the Bartlett high school zone in order to comply with the commitment previously made with reference to the Bartlett-Bolton high school situation.

In **August 1989**, the Court sent to all parties a memorandum noting the declining percentage of black faculty members in the Shelby County School District. The Court sought a response from the parties to the question of whether the reports submitted by the Board “indicate an employment practice or policy within the Shelby County Schools which achieves a gradual but definite decline in the number of black teachers employed by the school system.” The County responded that the decline in the percentage of black

faculty members in the Shelby County school district was explained in part by the decline in the number of black persons entering the teaching profession nationwide.

The United States noted that over the past twenty years the percentage of black teachers in the Shelby County School District has fallen steadily, from 30% to 19%.⁶ The United States also presented data indicating that from 1972 to 1989 the number of white teachers had more than doubled, from 629 to 1278, while the number of black teachers was virtually unchanged (272 to 301).

The government asserted, based on information provided by the County, that the Board's job offer rate was lower for black teachers than white teachers and that in the most recent school year the Board had "recruited almost 10 times as many white applicants as black applicants" (760 white applicants compared to 79 black applicants).

In determining whether these statistics reflect actual discrimination, the United States argued, the proper starting point for analysis was a comparison between the racial composition of the school's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. The United States referred to the 1980 Census which reported that of the 11,921 members of the labor force in Shelby County (as a whole) employed as elementary and secondary school teachers, 61% are white and 39% are black.

"The Memphis City Schools and the Shelby County Schools draw from the same labor pool. Yet, as of September 21, 1989 the Memphis City Schools had received 593 applications from blacks and 718 applications from whites while for the 1989-90 school year the Shelby County School Board received 70 application from blacks and 760 applications from whites." Although both schools attracted similarly large numbers of

⁶ This percentage has continued to fall since this debate occurred: from 19% in 1989 to 15% at present.

white applicants, “the Memphis City Schools recruit 8.5 times as many black applicants as does its neighbor the Shelby County School District.”

Ruling out one possible explanation for the discrepancy, the United States notes that “Memphis offers a starting salary . . . which it estimates to be slightly below the salary offered by the Shelby County School District.”

The United States cited statistics that indicated that the discrepancy was in large part the result of a less proactive approach to recruiting minority candidates: In 1988-89, the Shelby County Board visited and corresponded with 24 colleges and universities of which 9 were historically black. In comparison, the Memphis School System visited and corresponded with approximately 80 schools of which approximately 20 were historically black institutions. The United States also alluded to some anecdotal evidence of discriminatory conduct against black teachers by the County.

The government concluded that “the Shelby County School Board should be required to examine the district’s recruitment and hiring policies and practices and to explain fully its relative inability to hire black teachers in proportion to the number of black teachers in the relevant market.” The United States maintained that, while “the evidence is not sufficient to justify an order that the Board alter its current hiring policies, it is also our view that [] enhanced recruitment measures [] can be lawfully adopted and should be voluntarily adopted by the Board, and that the Board’s efforts in this regard should be included with its other faculty information.” The “enhanced recruitment measures” suggested included hiring a recruiter for minority personnel; continued contact by mail or in person with a larger number of predominantly and historically black

educational institutions; and the establishment of a more centralized hiring committee that could assist in identifying additional minority candidates for faculty vacancies.

Plaintiffs noted that the Memphis City School District had been able to maintain a 50-50 black-white teacher ratio in spite of the fact that blacks are entering the teaching profession in lesser numbers than they have historically. Among other measures, Plaintiffs recommended more detailed reporting of teacher employment statistics by race at critical points in the school year.

On **July 3, 1990**, the Court ordered the Board to submit supplemental annual reporting regarding minority faculty recruiting practices.⁷

On **August 14, 2006**, the Board and Plaintiffs filed a joint motion to dismiss the case, dissolving the order of the Court and declaring the Shelby County School System a unitary system. The parties averred that “all requisite functions and duties to be implemented by the Shelby County School system,” as mandated by the Court, have been fulfilled.

On **February 16, 2007**, the United States filed a response in which it expressed its support for the joint motion, stating that the Board had demonstrated that it “has complied with the requirements of its extant desegregation obligations, and . . . is entitled to declaration of unitary status and dismissal at this time.” In support of its position, the government noted that only six of the County’s 49 schools were “majority minority,” that the faculty at only 12 schools was less than 10% African American, and that the Board had “engaged in substantial recruitment targeting African American faculty, including interviewing at 13 historically black colleges and universities. Finally the United States

⁷ In the ensuing 16 years, Shelby County School’s hiring of minority faculty did not improve measurably, even as the Board metronomically reported its recruitment efforts and faculty statistics.

noted that it had not received any complaints concerning the district's compliance with its desegregation obligations.

THE COUNTY'S CONSTITUTIONAL OBLIGATIONS UNDER THE COURT'S ORDERS

The Court's vision of the County's obligations has indisputably evolved with time and with each new landmark decision by the Supreme Court. In 1964 the Court deemed the Board's plan deferring any effort to integrate school faculty or eliminate segregation in facilities or services, and allowing initial school assignment on a purely racial basis, with the right of transfer to any other school in the same general area but subject to largely insurmountable hurdles, to be in compliance with the requirements of Brown. In 1966, the Court determined that to comply with Brown the County was required to integrate its faculty, end initial assignment by race and eliminate segregation or discrimination in any school-sponsored service, facility, activity or program, including transportation, athletics, or other extra-curricular activity.

In 1967, the Court added more specific requirements regarding faculty integration: each faculty vacancy was to be filled by transferring from within the system a teacher whose race is under-represented in the faculty in which the vacancy existed, with a goal being a ratio of white teachers to black teachers reflective, within ten percentage points, of the ratio in the system as a whole. Annual reporting requirements were added to facilitate the Court's monitoring of the County's progress in faculty desegregation.

Following the Green decision in 1968, the Court required that, to the extent feasible, no school in the system was to be identifiable as a "white" or "Negro" school, and that, so far as feasible, the County was to maintain in each school a ratio of black to

white students reflective, within ten percentage points, of the composition of the system as a whole.

In 1970 the Court briefly equivocated, holding that “a school system that has honestly drawn unitary geographical zone lines, that is, zones not gerrymandered to preserve segregation, and that severely limits transfers, is not a ‘dual system’ with respect to pupils.” This retreat to a mere “racial neutrality” requirement was struck down by the Court of Appeals. In response, the Court ordered the complete dismantling of any remaining vestiges of segregation in this school system, extending to all facets of school operation. While the Court did not impose fixed ratios of pupils in particular schools, it required that the Board “reach toward the establishment of the systemwide pupil racial ratio in the various schools so that there will be no basis for contending that one school is racially different from the others.” These results were to be brought about “by the use, as necessary, of all available practicable techniques, including but not limited to restructuring attendance zones, pairing of attendance zones, restructuring of grade levels as between various schools, and use of transportation.”

On August 11, 1971, in the Court’s last major decree, the Court attempted to describe the “end game” in light of Swann. The Court echoed the Supreme Court’s holding that state-imposed school segregation and its vestiges have been done away with when the school system has become “unitary,” and that a system can be said to be unitary when the schools are no longer “racially identifiable.” The Court recognized that the racial composition of the system’s schools is an important factor in determining whether a school is racially identifiable. However, it made clear its position that it is not constitutionally required that each school in the system have approximately the same

ratio of whites to blacks as does the system as a whole and that some all-black (or white) or nearly all-black (or white) schools may continue to exist without necessarily violating the Board's constitutional obligations. Nevertheless, the Court stated, where a school system continues to maintain racially unbalanced schools, there is a presumption that the racial composition of such schools is a vestige of *de jure* segregation. It is the burden of the school board to show that such assignment of pupils is nondiscriminatory.

THE COUNTY'S COMPLIANCE WITH THE COURT'S ORDERS

I.

In its joint motion, the Board asserts that "it has complied with the Order of the Court . . . and has fulfilled to the greatest extent practicable all of the requirements required by the Court to abolish the last remaining vestiges of segregation in the Shelby County School System." The Board contends that "it has taken all steps and measures possible to foster desegregation[] and to eliminate 'to the extent practicable' the last vestiges of institutional racism within the Shelby County School System."

Among its "Propositions of Fact," the Board asserts that it has "utilized all avenues and resources available to ensure every school in the system has racial mix of students and staff as proportionate as possible." As to its student population, the Board states that "[t]he county system utilizes busing to transport students to schools in their district, and districts are designed with the students' welfare and time spent on the buses taken into consideration." Anticipating possible objections, the Board quotes this Court for the proposition that achievement of "a particular racial balance" is not required under the Constitution and that "a school system that has honestly drawn unitary geographical

zone lines, that is, zones not gerrymandered to preserve segregation, and that severely limits transfers . . . is not a ‘dual system’ with respect to pupils.”⁸

With regard to faculty, the Board asserts that it has “implemented a recruiting system that is facilitating the recruitment of African-American teachers and administrators, so that the system may employ said teachers and administrators at each individual school in numbers closely proportionate [to] the racial mix of students at each school.” In apparent anticipation of a possible perceived lack of factual support for its assertion, the Board states that “[t]he racial composition of available teachers and staff members in the Shelby County School System is predominantly Caucasian. However, the School Board has utilized the resources it has and, to its best ability, assigned African-American and Caucasian teachers to each Shelby County School in a number proportionate to its available teacher pool.”

The Board emphasizes its diligent filing of annual reports with the Court, exemplifying the Board’s good faith efforts to comply with the previous court order. Finally, the Board highlights its success on student achievement scores and the recognition of the Shelby County School System by the State of Tennessee as “Elite.”

II.

A close review of the procedural history of the case reveals that the Board’s compliance track record has been decidedly mixed. When the case was first filed, nine years after Brown declared segregated public schools unconstitutional, the Board denied it had violated Plaintiffs’ constitutional rights and claimed that it had “moved

⁸ As noted in the previous section, the quoted holding regarding zone lines is the single determination made by this Court to be struck down by the Court of Appeals. The quotation, therefore, tends to undermine rather than support the Board’s argument.

expeditiously but with proper regard, care and caution for the overall peace and tranquility of the community toward compliance with the decisions of the Supreme Court.” As evidence of its good-faith efforts, the Board stated that “applications by Negro citizens for admission to at least one public school, the enrollment of which has heretofore been all white, have been received for the 1963-1964 school season, and, if the scholastic and other administrative requirements of the Board of Education are met, these pupils will be enrolled.” The Board further asserted that it had “evolved a plan of desegregation for the county school system which [it] sincerely believe[d] will bring the operation of the Shelby County school system into full and complete compliance” with the law. This plan had “not as yet been reduced to writing since it was not contemplated by the defendants that any written plan or program would be necessary.”

The Board submitted a statement to the Court asserting that Plaintiffs’ suit was “unnecessary since a plan for desegregation of the Shelby County Schools has been developed, but there has been no request from any parent or student to cause this plan to be effected.” The Board further stated that it “felt that it should not initiate and force on the community schools an integration program which no one had requested.”

In retrospect, the County’s assertion that it had not implemented its “plan” to desegregate its schools because no one had asked seems comically preposterous, and appears to reflect an apparent intention to do as little as possible to upset the *status quo*, the momentous mandate of Brown notwithstanding. However, one must keep in mind that the Board’s plan, newly committed to writing, was received with favor by Judge Boyd, who stated that

the plan proposed by the defendant Board of Education to integrate the Shelby County schools is in all respects a sound one. It, without doubt, is

proposed in perfect good faith by the board, which has wide discretion in these matters under the law and is, as far as the Court can tell in full compliance with the letter and the spirit of the law.

Viewed in hindsight, it seems obvious that the plan, given its administrative hurdles and the prevailing societal pressures, would accomplish little, if any, actual desegregation. Nonetheless, the plan's passive, gradualist approach was characteristic of an era, one which would shortly come to an abrupt end.

Enactment of the Civil Rights Act of 1964 brought with it the vigorous intervention by the U.S. Department of Justice in a number of desegregation cases, including the present one. In response to the government's input, the Court entered a consent decree amending the Board's desegregation plan. The amendments required faculty integration and a student freedom of choice plan which did not assume racial segregation as its starting point.

After a semester under the new plan, the Court determined that the Board had failed to comply with its order in a number of respects. The Board admitted that it had virtually ignored the plan's requirement of filling all faculty vacancies by reassigning present employees. It had also failed to observe some of the most basic administrative requirements of the freedom of choice plans, effectively thwarting the transfer of black students to predominantly white schools.

In response to the Board's noncompliance, the Court imposed a number of remedial measures, most significantly a requirement that all faculty vacancies were to be filled by transferring from within the system a teacher whose race is "under-represented"⁹ in the faculty in which the vacancy exists. Teachers of the race that is overrepresented in

⁹ Meaning that its representation at a given school is substantially less than its representation in the County school system as a whole.

the school were to be employed by or assigned to a vacancy only if a teacher of the opposite race could neither be transferred nor employed without seriously impairing the education program. For the coming year, the Board was to transfer faculty to schools in which their race was under-represented in all cases in which the transfer could be accomplished without seriously impairing the educational program.

To ensure compliance with these new faculty integration requirements, the Court also imposed a number of reporting requirements on the County. Specifically, the Board was required, prior to filling any faculty vacancy with a teacher of the over-represented¹⁰ race, to report to the Court on its efforts to transfer or employ a teacher of the opposite race. In addition, in both August and October of each year, the Board was to file a report detailing faculty composition by race of each school, assignments by race for the coming year, the number of vacancies filled, and the number of such vacancies filled by a teacher of the overrepresented race.

Strict compliance with the new faculty integration requirement would have almost surely effected a very rapid transition to a system where the faculty at each school was reflective of the systemwide racial composition. This seems apparent because practically any vacancy at a school whose faculty was racially disproportionate would have set off a chain of intra-system transfers which would only stop when either complete racial balance was achieved or a vacancy resulted which was impossible to fill from within the system.

When the Board submitted its first required reports in August and October 1967, it reported that only 54 white teachers and 74 black teachers had been transferred to a

¹⁰ Meaning that its representation at a given school is substantially more than its representation in the County school system as a whole.

school in which the predominant race was not their own. With a faculty population of around 1500, almost entirely segregated, it is somewhat astonishing that the County saw it appropriate to transfer only 128 teachers for the new school year.

What is even more troubling is the apparent utter disregard for the requirement that the Court be notified before filling any faculty vacancy with a teacher of a race that is overrepresented in the faculty of the school in which the vacancy exists. A careful review of the record reveals that no such notification has ever been filed.

The annual August and October reports were intended to report vacancies filled by teachers of an overrepresented race only after the above reporting requirement was met. Instead, the Board ignored this initial requirement and then reported in August and October vacancies filled by teachers of the overrepresented race without comment, as if it was complying with, rather than defying, the Court's mandate.¹¹ In October 1967, the Board reported, without explanation, that of 200 vacancies filled, 188 were filled by a teacher of the overrepresented race.

In 1968, the Court recognized that, a result of the Green decision, integration of pupils and faculty was the legally required end result of all desegregation plans, as opposed to mere racial neutrality. To create a system in which no school would be racially identifiable, the Court set target ratios of whites to black for both teachers and students, to be phased in over two years. The record indicates that in the first year the County achieved its target ratio in 31 out of 41 elementary schools. In 1970, the Court acknowledged the greater difficulty in integrating high school faculties. While maintaining its goal of a ratio of white to black teachers in each school the same, within

¹¹ This practice continued into the late 1980s, when the Board, without explanation, ceased reporting altogether the number of vacancies filled by teachers of the overrepresented race.

10 percentage points, of that of the system as whole, the Court apparently lifted any deadline for such achievement at the high school level. In 1971, the Court stated that while ratios of pupils would not be required, the system should strive for a racial ratio such that “there will be no basis for contending that one school is racially different from the others.”

In June 1971, the Board stated that, with the implementation of its proposed plan, with which it purported to comply with Swann, “the defendants know of no reason why the Shelby County School System should not be classified as a unitary system and this case dismissed.” The Court adopted the Board’s plan, with some amendments. No motion was filed to declare the county system unitary, and the Court never ruled or publicly reflected on the matter. The approved plan featured a number of schools which were either disproportionately black or disproportionately white. The record does not indicate that the Court imposed upon the Board the burden of showing that the imbalance was not the product of past discrimination. Instead, the Court appears to have satisfied itself that further integration was not required because the neighborhood at issue was “stable,” because the racial composition of a certain school would have been the same had there never been *de jure* segregation, or because the school was disproportionately white, not black.

Since the late 1970s, the Court’s role in this case has largely been limited to approving unchallenged, or “consent,” proposals to construct new schools or alter attendance zone boundaries, accepting without scrutiny the parties’ agreement that such proposals would not impair desegregation efforts. One notable exception came in 1985 when the Court denied Defendant’s petition to construct 10 permanent additional

classrooms at Lucy Elementary School, stating that the Board had failed in its constitutional duty since it had given no consideration of how the improvement plan would impact the existing desegregation plan. The Court concluded that the Board had apparently accorded its concept of “community pride” a higher standing than its constitutional duty to eliminate all vestiges of segregation within the Shelby County school system.

In the late 1980s, the Court became concerned about the declining percentage of black faculty members in the Shelby County School District. The Board responded that the decline was largely a reflection of the general decline in the number of black persons entering the teaching profession nationwide. The Department of Justice countered with statistics indicating that although Memphis City Schools and the Shelby County Schools drew from the same labor pool, Memphis City schools recruited 8.5 times as many black applicants as did the Shelby County School District. The statistics seemed to indicate that the discrepancy was largely due to a less proactive approach to recruiting minority candidates. The statistics also indicated that the Board was less likely to offer a job to a black interviewee than a white one. Plaintiffs noted that Memphis City School District had been able to maintain a 50-50 black-white teacher ratio in spite of the fact that blacks are entering the teaching profession in lesser numbers than they have historically.

Following this exchange, the Court ordered the Board to submit supplemental annual reporting regarding minority faculty recruiting practices. The Board has dutifully included this recruitment supplement in its annual October faculty report from 1990 to the present. In the first few years of this reporting, the County appeared to reinvigorate its recruitment efforts, both generally and with regard to minority candidates: in 1993 the

Board reported that recruitment was conducted at more than twice the number of colleges reported in 1989, and more than twice the number of historically black institutions as well. The number of historically black institutions visited began to fall again in 1995 and by 2002 the number had fallen from a high of 24 in 1991 to a low of 7 in 2002. In recent years, that number has rebounded and stabilized at around 15.¹² Meanwhile, the percentage of black teachers has fallen steadily, from around 36% in 1967, to 19% in 1990, to 15% in 2006.¹³ This compares to the student population of the county system, which is presently around 34% black.

At the time this suit was filed in 1963, the County schools were completely segregated. Under the freedom of choice plans things changed only marginally: In the 1968-69 school year only 5% of black students attended schools with at least some white students. The following year, this number increased to 50%. However, the student bodies of eighteen of the County's fifty-three schools remained completely segregated, including eight all-black elementary schools and five all-black high schools. Only a tiny minority of County schools had achieved the racial balance reflective of County school population as a whole.

By 1971, the County had begun to implement integration of its schools in earnest: only 4 of the County's 36 schools had fewer than 10% black students and 23 had between 10 and 50% black students. There were no single race schools. By 1974 only 1 of the County's 28 schools had fewer than 10% black students and only 3 had more than 50% black. However, at least a quarter of the schools remained outside the target racial

¹² Although the Board reports recruiting at these institutions, the Court has no information on whether the recruiting was robust or merely superficial.

¹³ This persistent decline occurs during a period when the Memphis City Schools appear to have no problem recruiting minority faculty.

composition range established by the Court in 1968 and reiterated in its May 28, 1971 order. Curiously missing from the Board's submissions was any explanation of why one school had only 2% black students while a handful of others had as much 71%.

Beginning in the 1970s, pursuant to the Court's order, the County has periodically submitted proposed building plans and attendance zone changes for the Court's approval. The proposals have typically contained boilerplate language to the effect that the proposal in question was expected to have no adverse impact on the desegregation plan. In one such proposal for the 1977-78 school year, boundary line changes were proposed for six new schools and five existing schools. Of the new schools, not one was projected to have a black student representation greater than 11% (Ross Road: 11%; Altruria: 9%; Dogwood: 10%; Farmington: 8%; Germantown Elementary: 8%; Germantown Middle 6%).

Of the five affected existing schools, each was projected to have a substantially reduced black student population from the 1974-75 school year¹⁴ (Capleville: 19% → 8%; Bartlett: 14% → 8%; Ellendale: 26% → 10%; Elmore Park: 13% → 9%; Shadowlawn: 16% → 13%). It is difficult to see how creating new schools with a minimal number of black students and reducing markedly that number at existing schools does not "adversely impact" school desegregation efforts. It seems apparent that, by 1977, the pressure was off and desegregation was no longer on the County's front-burner.

By 1984, the percentage of black students systemwide had dropped precipitously, apparently largely due to annexation into the City of Memphis of portions of the County, from 30% in 1971 to 15%. The racial balance in the schools continued to be uneven, with

¹⁴ This is the closest school year for these statistics present in the record.

three schools out of 34 having fewer than 5% black students and three having between 50% and 72%.

The most recent statistics show that unevenness has become far more prevalent. Statistics for the 2004-05 school year show that of the County's forty-six schools, nine had less than 10% black students and six had between 56% and 90%. Only seventeen of the forty-six had a racial makeup that was reflective, within ten percentage points, of the 32% black student composition of the district as a whole. The County's new "state-of-the-art" Southwind High School, opening its doors this fall, is expected to have an 88% or higher black student population.

In summary, the Board's compliance with the Court's directive has been selective, spotty and anemic. In those instances where the Board adopted the Court's goal as its own, it has progressed with remarkable speed. The Board's rapid achievement of racial balance of faculty at the elementary level and the rapid gains in student integration in the first few years following the Swann decision are illustrative of this point. On the other hand, the Board has on occasion completely ignored aspects of the Court's orders, particularly with regards to faculty reporting requirements.

More importantly, however, the Board seems to have lost sight some time ago that the sole purpose for the Court's continued involvement in this case is to monitor and promote Defendant's compliance with its constitutional obligation to desegregate its schools. The Board's most recent motion for approval of zoning changes, for example, contains not a single mention of the changes' projected impact on the status of desegregation within the county system or any acknowledgment that such status is a necessary element in the Court's evaluation of the motion. Likewise, its recent motion for

approval of construction of the middle school merely states, without supporting data, that “[i]nitial zone planning does not anticipate any large shifts in racial composition of existing middle schools that will be affected by alteration in boundaries.”

The Court recognizes the great progress the Board has made in desegregating its schools. However, the law requires more than progress and the passage of time; it requires the complete dismantling of all vestiges of past state-imposed public school segregation with the ultimate goal of achieving a “unitary system.”

THE QUESTION OF UNITARY STATUS

The Court has repeatedly stated that elimination of racial identifiability is the key hurdle to achieving unitary status under this Court’s orders. In the Court’s view, racial balance of both faculty and students is clearly an essential element in achieving a system in which its schools are no longer racially identifiable. However, racial balance is not a strict requirement and there may be mitigating circumstances which would allow a school system to operate one or more schools with a predominance of one race or another without running afoul of its equal protection obligations under the Constitution. The procedural history makes clear that the Court has been insufficiently clear and forthright both in defining “racial balance” and in setting forth the circumstances under which “unbalanced” schools would be permissible. The present order represents an opportunity for the Court to redress these shortcomings.

The Supreme Court has declared that there is no “substantive constitutional right [to a] particular degree of racial balance or mixing,” Swann, 402 U.S. at 24, and “[r]acial balance is not to be achieved for its own sake.” Freeman v. Pitts, 503 U.S. at 494. Yet, courts have commonly used mathematical ratios as a means of measuring a district’s compliance with their desegregation decrees and the Supreme Court has repeatedly

upheld their use within certain constraints. See Freeman, 503 U.S. at 474 (“where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole”).

While target racial ratios are not viewed as legitimate goals for their own sake, statistical information regarding racial composition is one of the few objective means a court has to gauge a school board’s fulfillment of its constitutional obligations. Without such statistics a court must rely on anecdotal evidence, gut feelings, and assurances from defendants that they “love and respect every child regardless of their color” – hardly a proper basis for making momentous legal decisions.

The starting point of any desegregation analysis is Brown, in which the Supreme Court determined that segregated schools are inherently unequal. In the process of dismantling a segregated system, there is a “presumption against schools that are substantially disproportionate in their racial composition,” Swann, 402 U.S. at 26, because the Court assumes that, absent any mitigating circumstances, the racial composition of a school will reflect that of the school district in which it is located. See Freeman, 503 U.S. at 474 (“This inquiry is fundamental, for under the former *de jure* regimes racial exclusion was both the means and the end of a policy motivated by disparagement of, or hostility towards, the disfavored race.”). When a school has a racial makeup substantially at odds with the larger community, it must be deemed “racially identifiable” unless it can be demonstrated to be otherwise.

In pursuit of the goal of balance, two vital concerns must be factored into the Court's thinking. First, the Constitution requires only the elimination of the vestiges of state-imposed segregation to the extent *feasible, reasonable and workable*. See Swann, 402 U.S. at 31. In other words, the ideal of balance is not to be achieved at the expense of seriously undermining the education process or bankrupting the district. Second, a district cannot be held to continuing numerical benchmarks once a desegregation plan has "accomplished its objective." Freeman, 503 U.S. at 493; see also Spangler, 427 U.S. at 437. Thus, for instance, when racial balance in student assignment has been achieved, a district cannot be held responsible for maintaining such balance in perpetuity in the face of demographic forces beyond its control.

Applying these principles to the case at hand, the Court finds that the County is not presently in compliance with its constitutional obligations with regard to student assignment. As explained *supra*, the racial composition of the majority of the County schools is substantially disproportionate to that of the district as a whole. The Board has made no showing that racial balance is infeasible either generally or with regard to certain schools. Furthermore, the record does not indicate that the County has at any time accomplished its objectives; in fact, after making considerable progress towards desegregation, the County has seemingly drifted from any serious focus on desegregation.

While demographic factors, including those caused by annexation of portions of the County by the City of Memphis, have clearly played a part in creating the present racial composition of the County schools, the County has not met its burden of showing that it would have achieved its goal had it not been for these factors. Furthermore, as the

Supreme Court has articulated, the Board's decisions with regard to school construction and zoning have necessarily played an influential role in those demographic shifts. Consequently, the Court must assume that the remaining significant disparity in racial composition among the schools is a product of past *de jure* segregation.¹⁵

With regard to faculty, the Court finds the County likewise not in full compliance with its obligations under the law. There is broad unevenness in the racial composition of the faculties of the County schools, with schools ranging from 5% to 30% black. In view of this Court's longstanding order that vacancies be filled, whenever feasible, through transfer within the system of teachers underrepresented in the given school, such disparity appears indefensible. The Court is not persuaded that the Board has demonstrated good faith efforts in remedying this situation.

However, the distribution of faculty is but one aspect of the faculty integration issue. With the benefit of hindsight, it appears to the Court that the Court's historic exclusive focus on this aspect was ill-conceived. This determination is based on the Court's present understanding of the underlying rationale for a faculty integration requirement as part of school desegregation plan.

The Supreme Court has on a number of occasions recognized the importance of faculty desegregation as part of any school desegregation plan. See, e.g., U.S. v. Montgomery County Bd. of Educ., 395 U.S. 225, 231 (1969) ("Faculty and staff

¹⁵ The Court notes in passing that, viewed in retrospect, the Court's past determination that racial identifiability depends on how the community thinks of the school was less than helpful. The Court's reasoning yielded absurd results, e.g., a school being identified as "black" or "white," even though its racial composition was perfectly reflective of the district as a whole. Rather than clarify the issue, the Court's discussion merely served to muddy the analytical waters. The Court deems a more objective approach based primarily on numerical data to be far more fruitful. The Court also wishes to disavow its prior determination that in certain areas of the County school system the racial composition of the schools "would be the same if there had never been *de jure* segregation applicable to the area they serve." The Court now holds that such a determination is beyond the analytic powers of the Court and that the issue of racial identifiability must be dealt with on a county-wide basis.

desegregation [is] a goal that we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial discrimination.”). However, the Court doesn’t seem to have articulated a coherent theoretical foundation for this requirement. Many district courts, including this one, have taken faculty desegregation to mean a roughly even racial distribution among the schools within a school district. Implementation on this basis has created a perverse incentive to allow the overall black faculty representation to slip, thus lowering the threshold requirement in each school. Taking this approach to its logical extreme, a school could easily “desegregate” its faculty by simply eliminating all black teachers systemwide: the distribution of black teachers would then be perfectly uniform and the racial composition of each school precisely reflective of that of the whole system. This preposterous outcome illustrates that there is something fundamentally lacking in this approach.

What is lacking, this Court believes, is an understanding that a school desegregation plan is not an affirmative action program for teachers. In fact, it should not ultimately be about teachers at all. It is about providing equal educational opportunity to all *students* by eliminating the educational isolation of black *students*. This is most obviously manifest in the eradication of race-based public school student assignment in the present and the prohibition of one-race or nearly one-race schools that resulted from such raced-based assignment of the past.

There are other less obvious forms of racial isolation, however, and it is at these that the other five Green factors are aimed. If a black student is admitted to a school and yet is prevented from participating fully in extracurricular activities, or is required to use separate bathroom facilities or is denied transportation, he or she would be effectively

deprived of guaranteed equal protection rights. Similarly, the Court believes, in a period of transition from a state-imposed segregated school system, if a black child is allowed to attend a previously all-white school, but is denied educational guidance which includes teachers of the student's own race, the student is unacceptably isolated and deprived of a full educational experience. It is this unarticulated principle that, the Court concludes, animates the Supreme Court's emphasis on the importance of a diverse faculty.

On this ground, the Court finds that, rather than tying the racial composition of a school's faculty to that of the population of teachers in the system as whole, it should be linked instead to the racial composition of the *student* population. Accordingly, the Court finds it necessary to depart from its prior directives and concludes that the County's constitutional obligations require the achievement of a racial balance reflective of the systemwide student population, within a margin of error to be enumerated below and subject to mitigating circumstances and a feasibility requirement, as developed *supra*.¹⁶

Having thus found the County to be in noncompliance with its obligations as to both student assignment and faculty integration, the Court hereby **DENIES** the "motion to dismiss the injunction and declare Shelby County schools to have achieved full unitary status." The Court finds that the effects of past *de jure* segregation are still manifest and orders the County to continue its work of dismantling the vestiges of *de jure* segregation according to the terms set forth below.

In Freeman, the Supreme Court announced that the court in a school desegregation case has the discretion to order a partial withdrawal of its supervision and

¹⁶ In the hearing of July 23, 2007, Plaintiff's counsel asserted that it would be a violation of settled law to link the required faculty composition to the composition of the student population. Upon inquiry, counsel provided the Court with Carter v. West Feliciana Parish School Board, 425 F.2d 1211 (5th Cir. 1970) as case support for this proposition. Upon review, the Court finds nothing in the case to support counsel's contention.

control. 503 U.S. at 490-91. The Green decision set forth six factors to be examined in determining whether a school district was in compliance with its equal protection obligations under Brown: student assignment, faculty, staff, transportation, extracurricular activities, and facilities. 391 U.S. at 435. The primary focus of this case since its inception has been on student assignment and faculty integration, with an occasional mention of discrimination in student transportation. The Court has requested from the County additional statistical information on administrative staff, extra curricular activities¹⁷, and special education programs, which the County duly provided. The Court's review of this material and the record as a whole reveals no evidence that there has been racial discrimination by the County in the areas of facilities, transportation or staffing during the last few decades of this case. Furthermore, in the two public hearings conducted by the Court this year no credible claim of discrimination in these areas was presented.

In view of the Court's finding that the County is in compliance with its constitutional obligations with regard to school staffing, transportation and facilities, the Court can see no reason for any future monitoring of the County schools in these areas. Accordingly, the Court hereby **GRANTS** the motion to declare the County school system to have achieved unitary status only as to these three areas of concern.

Long ago the Supreme Court recognized the district court's "broad power to fashion a remedy that will assure a unitary school system." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). This Court has used that power rather tentatively and often ambiguously. In the last three and a half decades the Plaintiffs and

¹⁷ The Court has determined that the issue of extra-curricular activities requires further inquiry before declaring unitary status as to that area.

Defendant have largely been in lock-step regarding the direction of Shelby County schools. There have been few, if any contested issues, and only nominal litigation. Relying on the adversarial process, the Court has largely served to “rubber-stamp” the County’s unopposed construction and zoning requests with little or no meaningful review of how such proposals contributed to or detracted from the County’s overall progress toward unitary status. The Court’s failure to adopt clear and unequivocal guidelines for achievement of the Court’s goals is in large part responsible for the fact that the County is seeking unitary status some forty-four years after this suit was first filed, at a time when the County school system is in some respects more racially polarized than in the distant past. The joint motion to dismiss compels the Court to resume a more substantive role in bringing the County school system’s desegregation process to a legitimate closure.

While the Court finds that the County has not achieved full unitary status, and thus dismissal of this case would now be premature, the Court shares the parties’ interest in withdrawing Court supervision of the County school system as soon as possible upon achievement by the County of a unified system. To encourage this achievement, the Court has set forth guidelines and a timetable below which the County is ordered to incorporate into its administrative process immediately. It is the Court’s hope that this modified injunctive decree¹⁸ will provide the necessary framework for the County’s achieving full unitary status at the earliest possible date.

¹⁸ “There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.” Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 437 (1976) (quoting Sys. Fed’n v. Wright, 364 U.S. 642, 647 (1961)).

In reviewing the record and preparing this order, the Court has been reminded repeatedly that the expertise of this Court, and the expertise of courts in general, is in deciding legal matters, not in the field of management. For this reason, the Court has decided to appoint a special master with narrowly proscribed duties to oversee the County's future progress in this case and to report to the Court on that progress on a regular basis.

In amending the injunctive decree, the Court has paid due consideration to the administrative burden placed on the County by the Court's continued involvement in the case. Wherever possible, the Court has removed requirements which are unduly burdensome or no longer serve their intended purpose.

It is therefore **ORDERED**, without prejudice, that

1. In order to achieve a school system in which its schools are not "racially identifiable," the Board shall work towards racial balance in all its schools. The flexible goal of this effort, and a starting point in analyzing the Board's success in desegregation, shall be a racial composition of both faculty and students in each school that is reflective of the overall student population, with a margin of error of **fifteen (15)** percentage points.
2. Owing to the complexity of the issues involved, pursuant to Federal Rule of Civil Procedure 53, a special master shall be appointed by the Court for the purpose of presenting to the Court findings and recommendations on the Board's progress toward unitary status on or before January 15 of each year, commencing in January 2008. Absent further orders of the Court, the special master's duties shall be limited to analyzing the statistical data supplied by the

Board and preparing a report and recommendation based on the data for the benefit of the Court.

3. Within 30 days from the date of this order, the parties shall agree upon a neutral expert in educational research, preferably with experience in desegregation issues, to serve as a special master.¹⁹ If the parties cannot agree on an expert, each side shall submit to the court, within 10 days from the date of this order, the names of two prospective experts along with a summary of the expert's qualifications, not to exceed two pages, the expert's fee structure, and an itemized estimate for the expert's services, not to exceed one page. The Court will select a special master from among the four names submitted. After the special master has been selected, all communications between either party or Plaintiff-Intervenor and the special master shall be copied to the other parties.
4. Defendant will bear the cost of the special master's services, as approved by the Court.
5. The Board shall present raw student and faculty data for each school by race to the special master by October 1 of each year, commencing in the current year. The Board shall also present evidence of mitigating factors, including infeasibility of further desegregation and shifting demographics, as appropriate.
6. The special master shall analyze and present the data to the Court with its findings as to progress made by the Board in the preceding school year and

¹⁹ The parties are encouraged to consider the University of Memphis Center for Research in Educational Policy as an appropriate entity to perform these functions.

recommendations as to whether the County should be deemed to have achieved full compliance with the terms of this order, giving due consideration to the aforementioned evidence as to mitigating factors.

7. The Board shall continue to file notices of all future building plans and attendance zone changes with the Court and furnish counsel for the original plaintiffs and the Attorney General with copies of such notices. The Board shall also submit notice to the special master for evaluation and recommendation to the Court. The Court shall only consider for approval proposals accompanied by comprehensive projections as to the proposal's expected impact on the County's desegregation efforts in conformity with the terms of this order.
8. The Board will no longer be required to prepare or submit to the Court annual faculty reports.
9. The Board will no longer be required to prepare or submit to the Court supplemental minority recruitment reports.
10. The Board shall achieve full compliance, as determined by the special master and this Court, no later than October, 2012.
11. Upon a determination of full compliance with this order, the court-appointed special master shall continue to monitor and report to the Court on compliance by the County for an additional period of three years. At the end of this three-year period, expected to end on or before October, 2015, the Court, upon notice and a hearing and a determination that the County has maintained full

compliance, will issue a declaration that the County has achieved full unitary status and will dissolve this decree and dismiss the case in its entirety.

CONCLUSION

The Court is well aware that Plaintiffs, the Defendant, and the DOJ intervenor all support unitary status. As a neutral, however, the Court has a duty to independently evaluate the progress of Shelby County schools in achieving compliance with the court's order to fully remove all vestiges of *de jure* segregation. At this point, the Shelby County school district does not yet merit a passing grade.

For the reasons stated herein, the Court hereby **GRANTS** the joint motion to declare unitary status as to the issues of staff, transportation, and facilities, and **DENIES** the motion to declare unitary status as to the issues of extra-curricular activities, student assignment and faculty integration. The Court further orders the Defendant to adopt immediately the measures set forth herein for the purpose of bringing Defendant into full compliance with its constitutional obligations according to the timetable provided.

The Court will set a further hearing within sixty days to appoint the special master.

IT IS SO ORDERED this 26th day of July, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE